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IN THE COURT OF APPEALS OF INDIANA

STEPHAN ARNDT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 63A01-0806-CR-261
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Jeffrey L. Biesterveld, Judge
Cause No. 63C01-0701-FC-8

February 19, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Stephan Arndt challenges his convictions and sentences for Sexual Misconduct with a Minor, as a Class C felony,[1] and Sexual Battery, as a Class D felony.[2] We affirm.

Issues

Arndt raises four issues on appeal, which we consolidate and restate as:

I. Whether the trial court erred in denying his motion to dismiss pursuant to Criminal Rule 4(C);

II. Whether there was sufficient evidence to support his convictions; and

III. Whether the trial court abused its discretion in imposing consecutive sentences.

Facts and Procedural History

M.D.V. was born on September 27, 1990. M.D.V. was friends with Arndt's step-daughter and frequently stayed overnight at Arndt's residence during 2005. On several occasions when M.D.V. stayed the night, Arndt came into the room where the girls were sleeping, lifted the covers, and rubbed M.D.V.'s legs, breasts, and vaginal area while M.D.V. was clothed and pretended to sleep. Each incident lasted between fifteen to twenty seconds.

J.S. was born on March 28, 1991. J.S. planned to stay with the Arndts during the week of July 2, 2006, while her family was out of town. As J.S. and Arndt's step-daughter slept in the step-daughter's room on July 3, 2006, Arndt entered the room in his underwear

[1] Ind. Code § 35-42-4-9(a).
[2] Ind. Code § 35-42-4-8(a).

and placed J.S.'s foot on his groin area. J.S. testified that Arndt had an erection at the time. Arndt then proceeded to remove J.S.'s sweatpants. J.S. woke to a groggy state but kept her eyes shut, pretending to sleep. After he removed J.S.'s sweatpants, Arndt put a pair of shorts on her. Arndt then reached up J.S.'s hoodie, unhooked her bra and removed it. Then Arndt removed J.S.'s hoodie, stood there for a minute looking at J.S., looked around the room for a shirt and put a regular shirt on her.

On January 4, 2007, the State charged Arndt with Sexual Misconduct with a Minor, as a Class C felony (for acts as to M.D.V.), and Sexual Battery, as a Class D felony (for acts as to J.S.). After a jury trial, Arndt was found guilty as charged. The trial court sentenced Arndt to four years for Count I and one and one-half years for Count II, to be served consecutively.

Arndt now appeals.

Discussion and Decision

I. Criminal Rule 4(C)

The provisions of Indiana Criminal Rule 4 implement an accused's right to a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution and by Article I, Section 12 of the Indiana Constitution. Cole v. State, 780 N.E.2d 394, 396 (Ind. Ct. App. 2002), trans. denied. Criminal Rule 4(C) provides in relevant part:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court

calendar[.]

If the trial court sets the trial date beyond the one-year limit provided under Criminal Rule 4(C), the defendant must file timely objection or waive his right to a speedy trial. Marshall v. State, 759 N.E.2d 665, 668 (Ind. Ct. App. 2001). Whether the defendant seeks or acquiesces in a delay that results in a later trial date, the delay extends the time limitation by the length of the delay. Blair v. State, 877 N.E.2d 1225, 1231 (Ind. Ct. App. 2007), trans. denied. "Whether a particular delay in bringing a defendant to trial violates the speedy trial guarantee is a determination that largely depends on the specific circumstances of the case." Id. (quoting Marshall, 759 N.E.2d at 668).

Arndt was arrested for the charges on January 10, 2007. The trial was set for August 14, 2007. At the final pretrial conference on July 30, 2007, Arndt requested a continuance of the trial. The State objected, and the trial court denied the motion. After the State filed Supplemental Proof of Compliance with Discovery Order that demonstrated that it had supplied Arndt with two cassette tapes containing Arndt's interviews with the Indiana State Police, Arndt moved on August 13, 2007, to continue the date of the trial. The trial court granted the motion, resetting the trial to October 10, 2007, and noted that the delay was attributable to Arndt. On October 2, 2007, Arndt again moved to continue the trial date, which was reset for December 4, 2007. On November 26, 2007, the State moved to continue the trial date to which Arndt objected. The trial court granted the motion and reset the trial to March 18, 2008. After another granted motion to continue requested by Arndt, the trial began on April 28, 2008. On February 26, 2008, Arndt filed a Motion for Discharge Under

Criminal Rule 4(C), which the trial court denied.

Arndt concedes that the delay from his October 2, 2007 granted motion for continuance is attributable to him. The portion of time that is contested is August 14 to October 10, 2007, when Arndt was granted a continuance. Citing Marshall v. State, 759 N.E.2d 665, 669 (Ind. Ct. App. 2001), Arndt contends that this delay is not attributable to him because the State's failure to produce the cassette tapes of his interview with police in a timely manner necessitated a continuance. However, this case is distinguishable from Marshall because in Marshall, the State's failure to respond to discovery requests was blatant and well-documented. In Marshall, the defendant "actively pursued the evidence" and had to seek repeated continuances due to the State's repeated failure to comply with discovery requests. Id.

Here, the CCS indicates that the State diligently complied with Arndt's discovery requests. The State filed initial and supplemental proofs of compliance with the discovery order. Arndt also does not contend that the State was not cooperative with discovery. The exhibit in question, a recording of Arndt's interview with police, is one that is routine in criminal investigations. Furthermore, the exhibit contained the defendant's own statements, which were also summarized in the affidavit of probable cause. Arndt has not shown how he was prejudiced by the delay of receiving the cassettes. Although Arndt has not provided a transcript of the relevant pretrial hearing, it is clear that the trial court did not find Arndt to be prejudiced by the late revelation of the tapes as it specifically noted in the CCS that the said delay was attributable to Arndt for purposes of Criminal Rule 4. It is also noteworthy that the

trial court denied Arndt's request for a continuance two weeks prior to the revelation of the tapes. In light of these circumstances, we conclude that there was no violation of Arndt's rights under Criminal Rule 4(C).

II. Sufficiency of the Evidence

Arndt also argues that there is insufficient evidence to support his convictions. In addressing a claim of insufficient evidence, we do not reweigh the evidence nor do we reevaluate the credibility of witnesses. Rohr v. State, 866 N.E.2d 242, 248 (Ind. 2007), reh'g denied. We view the evidence most favorable to the verdict and the reasonable inferences therefrom and will affirm the conviction if there is substantial evidence of probative value from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. Id. In general, the uncorroborated testimony of one witness is sufficient to sustain a conviction on appeal. Seketa v. State, 817 N.E.2d 690, 696 (Ind. Ct. App. 2004). However, appellate courts may apply the "incredible dubiosity" rule to impinge on the jury's function to judge the credibility of a witness. Fajardo v. State, 859 N.E.2d 1201, 1208 (Ind. 2007). The rule is as follows:

> If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Id. (quoting Love v. State, 761 N.E.2d 806, 810 (Ind. 2002)). However, discrepancies between a witness's trial testimony and earlier statements made to police and in depositions

do not render such testimony "incredibly dubious." Holeton v. State, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006).

A. Sexual Misconduct with a Minor

Arndt contends that M.D.V.'s testimony was incredibly dubious. However, Arndt's argument is essentially an invitation to reweigh the evidence as he does not detail how her testimony is inherently improbable or equivocal. Rather the argument is conjecture based on the proximity of Arndt's step-daughter during the acts and the length of time before the violations were reported. We decline this invitation to reweigh the evidence.

B. Sexual Battery

Next, Arndt argues that the State failed to prove the necessary element that the victim is compelled to submit to the touch by force or imminent threat of force. However, this argument is misplaced, because Indiana Code Section 35-42-4-8(a) defines Class D sexual battery as:

> A person who, with intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:
> (1) compelled to submit to the touching by force or the imminent threat of force; *or*
> (2) so mentally disabled or deficient that consent to the touching cannot be given[.]

(emphasis added). The amended information alleges that Arndt committed the offense against J.S. while she was asleep or waking from sleep, making her mentally disabled or deficient. As Arndt does not challenge the evidence supporting this element of the offense, namely, that J.S. was mentally deficient during the incident because she was sleeping, the

evidence is sufficient to support the conviction as charged.

III. Consecutive Sentences

Finally, Arndt contends that the trial court abused its discretion by imposing consecutive sentences because the trial court found that the balance between the aggravators and mitigators was equal. We review a trial court's decision to impose consecutive sentences for an abuse of discretion. Quiroz v. State, 885 N.E.2d 740, 741 (Ind. Ct. App. 2008), trans. denied. Indiana Code Section 35-50-1-2 allows trial courts to determine whether terms of imprisonment shall be served concurrently or consecutively in light of aggravating and mitigating circumstances. "A consecutive sentence must be supported by at least one aggravating circumstance." Id. However, when a trial court finds the circumstances to be in equipoise, there is no basis upon which to impose consecutive sentences. Wentz v. State, 766 N.E.2d 351, 359 (Ind. 2002).

Here, the trial court noted that it considered the following:

> The harm suffered by the victims in this (sic) offenses were significant; the person was in the position of having the care and trust of the defendant (sic), or of the victims of the offenses. The Court finds the following mitigating factors: that the person has no history of delinquent or criminal activity or the person has lead (sic) a law-abiding life for a substantial period before commission of the crime; and secondly, that imprisonment of the person will result in undue hardship to the person or the dependents of the person. The Court considers the balance between the aggravating and mitigating factors to be equal.

Transcript at 293. After imposing the advisory sentence for each count, the trial court noted "the sentences for Count I and Count II shall run consecutively." Id. The trial court provided no basis or aggravator supporting the imposition of consecutive sentences.

While this Court has recently upheld consecutive sentences where the trial court found the aggravators and mitigators to balance, nevertheless, in that instance, the trial court provided an additional aggravator to support the imposition of consecutive sentences. See Lopez v. State, 869 N.E.2d 1254, 1259 (Ind. Ct. App. 2007) ("Because the court based its imposition of consecutive sentences upon this free-standing aggravating factor, its initial finding of balance does not serve to invalidate the consecutive nature of the sentences."), trans. denied; Gleaves v. State, 859 N.E.2d 766, 771 (Ind. Ct. App. 2007). Here, there was no additional aggravator to support the imposition of consecutive sentences. Without finding an additional free-standing aggravator beyond the factors found to be in equipoise, the trial court had no basis upon which to impose consecutive sentences. We therefore conclude that the trial court abused its discretion by imposing consecutive sentences.

Notwithstanding this failure to identify an aggravator to support the imposition of consecutive sentences, it is clear from the record, specifically the charges of separate crimes against two victims and the subsequent convictions, that the aggravator of multiple victims would support consecutive sentences. Our Supreme Court has held that consecutive sentences are appropriate in cases involving multiple victims as such sentences "seem necessary to vindicate the fact that there were separate harms and separate acts against more than one person." Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003). Therefore, pursuant to our ability to review and revise sentences under Indiana Appellate Rule 7(B), we conclude that consecutive sentences are appropriate in these circumstances because there were two separate victims and consecutive sentences would vindicate the separate harm done to each

victim.

Affirmed.

MATHIAS, J., and BARNES, J., concur.